In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

ADVANCED PROFESSIONAL MARKETING, INC.,

and

MARISSA BECK, Individually and President,

RESPONDENTS.

ARB CASE NO. 12-069

ALJ CASE NO. 2008-LCA-017

DATE: June 3, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Roger W. Wilkinson, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor*, Washington, District of Columbia

For the Respondents:
William A. Stock, Esq.; *Klasko, Rulon, Stock & Seltzer, LLP*; Philadelphia, Pennsylvania

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge. Judge Corchado, concurring.*

FINAL DECISION AND ORDER

The INA permits an employer to hire nonimmigrant workers in "specialty occupations" to work in the United States for prescribed periods of time.[1] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.[2]

An employer seeking to hire an H-1B worker must obtain Department of Labor (DOL) certification by filing a Labor Condition Application (LCA).[3] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.[4] To complete the LCA, the employer must provide specific information including the number of aliens to be hired, the occupational classification, the prevailing wage, the source of such wage data, the date of need, and the period of employment.[5] After securing the certification, and upon approval by the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.[6]

The Administrator, U.S. Department of Labor, Wage and Hour Division (WHD), brought this suit against Advanced Professional Marketing, Inc. and Marissa Beck (individually and as Corporation President, APMI) for violating the LCA regulations under the H-1B program.

APMI is a New York-based staffing company and sponsor of H-1B visa workers, including physical therapists, nurses, and other skilled healthcare workers in the greater New York area. Beck is the President and sole shareholder. In January 2006, WHD initiated an H-1B compliance investigation of APMI. On March 10, 2008, the Administrator issued a Notice of Determination listing a number of violations including: (1) willful failure to pay wages; (2) requiring H-1B nonimmigrants to pay a penalty for early cessation of employment; (3) failure to make LCAs and other necessary documents available for public examination; and (4) failure to cooperate in the investigation as required. The Administrator initially calculated that APMI owed $2,920,270.37 in back wages to 156 individually named H-1B nonimmigrants. The Administrator also assessed $512,000 in civil money penalties.[7]

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[1] 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (Thomson/West 2005 & Thomson Reuters Supp. 2013); 20 C.F.R. § 655.700 (2013).

[2] 8 U.S.C.A. § 1184(i)(1).

[3] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.730-734.

[4] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

[5] 20 C.F.R. § 655.730(c)(4).

[6] 20 C.F.R. § 655.705(a), (b).

[7] *Administrator, Wage & Hour Div. v. Advanced Professional Marketing, Inc.,* ALJ No. 2008-LCA-017, slip op. at 1 (Apr. 3, 2012)(Final Decision and Order (F. D. O.)).

During the investigation, the Administrator concluded that there were numerous incorrect and missing LCAs. To calculate back wages in light of missing and deficient LCAs, the WHD investigator, Mary Dodds, extrapolated and reconstructed prevailing wage rates from data provided. Dodds obtained copies of 117 LCAs of the 156 filed. Dodds was unable to locate, from Respondents or any other source, copies of 39 of the LCAs filed.[8] For the vast majority of the LCAs Dodds was able to locate, APMI listed the Bureau of Labor Statistics' (BLS) Occupational Employment Statistics (OES) Wage Survey as the source of the prevailing wage.[9] Forty-nine of the 117 LCAs Dodds examined contained correct prevailing wage determinations (PWD), which matched the prevailing wage listed on the OES Wage Survey used by Respondents.[10] Dodds used these accurate PWDs to calculate back wages directly.[11] The prevailing wage rates listed on 43 LCAs were round numbers that the investigator knew were wrong (because no PWRs ended in round numbers) and were lower than the corresponding prevailing rate set forth in the OES Wage Survey.[12] For those LCAs, Dodds substituted the incorrect wage rates with the applicable higher rates from the OES Wage Survey.[13]

With respect to the 39 missing LCAs, Dodds approximated the relevant time period from other available documentation such as I-797 Notices of Action, which list the effective date of authorized employment. To be conservative, Dodds used the OES Wage Survey rates in effect 6 months prior to the relevant dates she reconstructed for the missing LCAs. Dodds asserted, and Respondents did not deny, that Respondents were represented by counsel with whom she was in touch throughout the course of her investigation (from January 2006 until the March 10, 2008 Notice of Determination). During that time, Respondent never challenged the methodology Dodds used to determine the missing or incorrect prevailing wages.[14]

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[8] Hearing Transcript (Tr.) at 26-29, 153; *Administrator, Wage & Hour Div. v. Advanced Professional Marketing, Inc.*, ALJ No. 2008-LCA-017, slip op. at 15, 19, 22 (Dec. 31, 2009)(Decision and Order (D. & O.)). Dodds's Affirmation dated January 16, 2009, states that "Respondents were unable to provide WHD with copies of 37 LCAs" as required by statute. Dodds's Affirmation at 3, #15. However, the parties stipulated that Respondents failed to produce required records for approximately 39 individuals. Stipulations, para 22. The ALJ found that "LCAs were not obtained for 39 of the 156 H-1B nonimmigrant workers." *See* D. & O. at 22.

[9] Tr. at 55-56. The OES rate is a BLS product used by the Office of Foreign Labor Certification (OFLC) data center. Tr. at 22-23, 93. The new regulations substitute the OFLC National Processing Center (NPC) for the state workforce agencies (SWA) as the entity to determine PWDs when employers use this resource during the initial LCA approval process.

[10] D. & O. at 20; Tr. at 26.

[11] Tr. at 20-25, 68.

[12] D. & O. at 20; Tr. at 22.

[13] For the remaining 25 LCAs, Dodds substituted PWDs from the OES Wage Survey in place of wage data listed in the LCAs. D. & O. at 22.

[14] Tr. at 24-25, 48.

Following the investigation, APMI requested a hearing and the case was assigned to an ALJ. Before the ALJ, APMI moved for summary decision on the ground that the Administrator violated Section 655.731(d) by assigning its own PWD and depriving APMI of the ability to contest the PWD as provided for in Section 655.731(d)(2).[15] APMI argued that the Employment and Training Administration (ETA) was the specialist and the correct institution to determine the prevailing wage. APMI argued that had the Administrator used ETA to determine the PWD, APMI would have had access to a complaint system, which was the intent behind the regulation and the exclusive means of challenging the PWD.

The Administrator argued in response that the regulations do not require that the Administrator go to ETA, they only provide that she *may* go to ETA.

On January 27, 2009, the ALJ issued an order denying APMI's motion for summary decision. The ALJ concluded that Section 655.731(d) does not contain language requiring the Administrator to go to ETA for a PWD. The ALJ emphasized that the regulation uses the word "may" rather than "shall." The ALJ further held that the regulations do not prohibit the Administrator from using other authoritative sources to determine the PWD.

1. ALJ's December 31, 2009 Decision and Order

Following the denial of APMI's summary decision motion, the ALJ held a hearing on February 12, 2009. Prior to hearing, parties stipulated numerous matters including total back wages owed.[16] After the hearing and post-hearing briefing, the ALJ issued her order.

a. The ALJ Affirmed the Administrator 's Determination of Most PWDs

The ALJ found that the Administrator's assessment of a PWD was adequate for 131 of 156 nonimmigrants. Dodds identified many LCAs with correct PWDs. Dodds used this data to calculate back wages. Parties did not dispute the Administrator's assessment for this class of workers and the ALJ affirmed. For the LCAs in which Dodds corrected a minor rounding error, the ALJ found that this was merely a ministerial task and that the Administrator committed no error.[17] For the LCAs that were not produced and could not be located, Dodds again used a PWD from the OES survey.[18] Dodds's rationale was that because APMI selected the OES

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[15] Section 655.731(d)(2) provides that an employer who desires review of a PWD obtained from ETA may file a request for review with NPC within 30 days. An employer may then appeal the NPC decision to the Board of Alien Labor Certification Appeals (BALCA) within 30 days. The PWD as determined by BALCA is the final determination for all purposes. § 655.731(d)(2).

[16] JX-1-JX-3; D. & O. at 2-3.

[17] D. & O. at 20.

[18] *Id.* at 22.

survey for almost all of the other LCAs filed, the OES survey was presumed for missing LCAs as well.[19] The ALJ found that Dodds's inference was reasonable.

b. The ALJ Reversed the Administrator's Assessment for 25 PWDs

For a class of 25 PWDs in which the LCA had a PWD but not an obviously incorrect value, Dodds disregarded the PWD and substituted a different PWD. The ALJ concluded that there was no testimonial or other evidence explaining why Dodds did what she did and thus nothing establishing the reasonableness of that action.[20] The ALJ rejected the Administrator's assessment and ordered recalculation for these 25 workers based on APMI's LCA PWD.

c. "Must go to the ETA" Argument

At hearing, APMI renewed its objection to the Administrator's procedure for establishing the PWDs. APMI maintained that Dodds should have gone to ETA to have it establish the PWDs. APMI introduced a section of the WHD Field Operations Handbook (FOH) containing language that the Administrator must go to ETA.

Dodds acknowledged the FOH language but clarified that in practice the Administrator alerts the employer of an invalid PW rate and gives the employer an opportunity to rectify the problem.[21] If the employer sticks with its rate, then the Administrator can go to ETA to establish a valid rate. According to Dodds, it is a colossal waste of time to go to ETA if the rate is readily ascertainable, and no one objects to the Administrator's correction of the employer's wages.[22]

The ALJ noted that the statute mandates that the Secretary establish a means of receipt, investigation, and disposition of complaints regarding the LCA. The ALJ concluded that the regulations in Part 655 address that obligation. The ALJ considered the Administrator's broad discretion in conducting investigations.[23] Although the FOH language uses "must be obtained from the ETA," the ALJ held that the implementing regulations in Part 655 were the primary and binding authority fulfilling the statute's mandate. And those regulations were permissive on the point of going to ETA.[24]

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19 Tr. at 45, 55.

20 D. & O. at 22.

21 Tr. at 48; D. & O. at 7.

22 Tr. at 50.

23 D. & O. at 21.

24 *Id.*

The ALJ also observed that the administrative review procedures at Section 655.840(c) do not cover the case where the Administrator did not go to ETA for a PWD and that it is unclear how the ALJ is to review the Administrator's PWD in this situation. The ALJ reasoned that the necessity of meaningful review dictated that the Administrator should not make unilateral PWDs but should explain the process used so that review is possible. The ALJ concluded that the Administrator's establishment of a PWD (not going to ETA for a PWD) was subject to review for reasonableness.[25] The ALJ further concluded that in this case, the Administrator used existing prevailing wage data, the accuracy of which was not disputed.[26]

2. ALJ's April 3, 2012 Final Decision & Order

On January 8, 2010, the parties jointly requested the Judge to issue a final decision that allowed for ARB review.[27] Shortly thereafter, the ALJ issued an order stating that she would reconsider her December 31, 2009 D. & O. and issue a final decision.

On May 12, 2010, the Administrator submitted revised computations in accordance with the December 31, 2009 Order. The Administrator's total assessment went up to $3,947,054.91.[28]

APMI objected to the Administrator's revised computations on June 10, 2010. APMI took issue with the fact that the parties had stipulated to facts, and the revisions breached those stipulations.

The ALJ concurred that she did not have authority to disregard stipulations in this case and issued her reconsideration order on April 3, 2012.[29]

Upon reconsideration, the ALJ affirmed the Administrator's initial prevailing wage determinations for several classes.[30] For the remaining 25 nonimmigrants for which the ALJ had

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[25] D. & O. at 21.

[26] *Id.* at 22.

[27] F.D.O. at 3.

[28] *Id.*

[29] *Id.* at 5.

[30] The ALJ reversed her Dec. 31, 2009 D. & O. rejecting the Administrator's initial decision on beginning and ending dates for the nonimmigrant workers. Initially, the ALJ had said that those determinations contained errors. Upon reconsideration, the ALJ concluded that the underlying dates were stipulated. D. & O. at 10. The ALJ also reversed her December 31, 2009 order on deductions. The ALJ initially had said that APMI was correct that the deductions were not violations because they did not fall below the required wages. Upon reconsideration, the ALJ concluded that the underlying deductions were stipulated. *Id.* at 12. The ALJ also affirmed her initial determination as to civil penalties and debarment. *Id.* at 14-15. The ALJ modified her initial determination to award

ordered recalculation, the ALJ found the stipulation ambiguous. Thus, the ALJ affirmed her order for recalculation because the Administrator did not establish why she substituted a different PWD for the employer's PWD that was not obviously wrong, i.e., was not an even or round number. The ALJ applied a standard that the Administrator must have both a solid basis for disputing the employer's PWD as well as some reasonable methodology in assigning a substitute PWD. And the Administrator failed that standard in its assessment of back wages for 25 nonimmigrants. Accordingly, the ALJ affirmed her December 31 Order for recomputation for the 25 nonimmigrant employees. The ALJ reduced the recomputed amount by $55,054.10.[31] Thus, the total back wages order was reduced to $2,865,216.27.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.[32] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[33] Where the ALJ decides an issue as a matter of law, as in this case, there is no question that the ARB has plenary power to review the ALJ's legal conclusion de novo.[34]

DISCUSSION

While the initial order and reconsideration order were detailed, the appeal is limited to one issue. In the motion for summary decision and the December 31, 2009 Order, the ALJ determined that the Administrator possessed discretionary authority to issue a PWD based on information of record in the course of its investigation. On appeal, APMI argues that when the Administrator determined that APMI's PWDs were insufficient, the Administrator was obligated to obtain a PWD from ETA, citing 20 C.F.R. § 655.731(d)(2); Field Operation Handbook (FOH)

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prejudgment compound interest on all back pay awards. *Id.* at 15. The ALJ also awarded post-judgment interest (not compounded) for all back pay awards. *Id.*

[31] F.D.O. at 14.

[32] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. *See* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[33] 5 U.S.C.A. § 557(b) (West 1996).

[34] *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

§ 71(d)(6)(A). APMI argues that because the Administrator did not go to ETA, it was denied access to a means of grieving the PWD. For the reasons below, we affirm the ALJ.

1. Regulatory Framework

The H-1B employer can follow a number of methods to initially establish a PWD. The employer determines the "prevailing wage" that it lists on the LCA "on the best information available as of the time of filing the application." The employer is not required to use any "specific methodology" but may use "an independent authoritative source, or other legitimate sources of wage data."[35] There are preferred sources such as a collective bargaining agreement (CBA) and the Bureau of Labor Statistics' Occupational Employment Statistics (OES) Wage Survey. If the employer chooses, it can, before filing an LCA, request a PWD from the OFLC NPC. If the employer does not like NPC's determination, it can appeal that determination through 20 C.F.R. § 656.41. Once determined by NPC, or, if appealed, reviewed through a wage appeal under Section 656.41, that PWD is final for all purposes. In other words, the prevailing wage cannot be further reviewed during the enforcement phase (Section 655.731(d)) or during the litigation phase (Section 655.800 et seq.).[36]

An H-1B employer must have and retain proper documentation in support of its LCA wage attestations.[37] It must have "documentation regarding its determination of the prevailing wage" including "[a] copy of the prevailing wage finding from the [source] for the occupation within the area of intended employment; or [a] copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source . . . or [a] copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination."[38] The Administrator determines whether an employer has the proper documentation to support its prevailing wage attestation. If the documentation is nonexistent or insufficient, the Administrator may find a violation of paragraph (b)(1), (2), or (3), of § 655.731.[39]

In this case, APMI did not go to ETA for a PWD before filing its LCAs. APMI listed BLS's OES Wage Survey as the source of the prevailing wage on most of the LCAs the Administrator reviewed. A number of the relevant LCAs were missing and the Administrator challenged other APMI PWDs during the investigation. Based on information extrapolated from available documentation, the Administrator assigned a PWD from the OES Wage Surveys for the

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35 20 C.F.R. § 655.731(a)(2).

36 20 C.F.R. § 655.731(a)(2)(ii)(A). State workforce agencies rather than NPC were used at the time of APMI's LCAs. *Supra* note 9.

37 20 C.F.R. § 655.731(b).

38 20 C.F.R. § 655.731(b)(3)(iii)(A), (B), or (C).

39 20 C.F.R. § 655.731(d)(1).

missing and incorrect LCAs. The question APMI raises is whether the Administrator was mandated to obtain a PWD from ETA during the enforcement or investigation phase. Section 655.731(d) covering the Administrator's enforcement provides in part:

> (d) Enforcement actions.
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> (1) In the event that a complaint is filed pursuant to subpart I of this part, alleging a failure to meet the "prevailing wage" condition or a material misrepresentation by the employer regarding the payment of the required wage, or pursuant to such other basis for investigation as the Administrator may find, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or is insufficient to determine the prevailing wage (e.g., does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator **may** contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. . . .
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> (2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the PWD from the Administrator. If the request is timely filed, the decision of OFLC is suspended until the Center Director issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the NPC Center Director, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this

> chapter within 30 days of the receipt of the decision of the Center Director. . . . [40]

2. The Administrator is not required to go to ETA

INA provisions relating to investigations of LCA violations explicitly delegate the design and disposition of those investigations to the Secretary of Labor: "the Secretary shall establish a process for the receipt, investigation, and disposition of complaints . . . ."[41] And the governing regulations similarly grant the Administrator broad discretion to "conduct such investigations as may be appropriate" and "gather such information as deemed necessary."[42] As the ALJ found, the Administrator may seek an appropriate prevailing wage determination when a complaint alleges failure to pay wages and (1) the employer's documentation is "either nonexistent or is insufficient to determine the prevailing wage," (2) the Administrator "has reason to believe" that the prevailing wage obtained varies substantially from the wage prevailing for the occupation in the area of intended employment, or (3) the employer has been unable to demonstrate that the prevailing wage determined by an alternate method is in accordance with the regulatory criteria.[43]

In an enforcement action where the employer failed to maintain adequate documentation to support the wage listed in the LCA, the "Administrator *may* contact [the] E[mployment] T[raining] A[dministration], which *shall* provide the Administrator with a prevailing wage determination which the Administrator shall use as the basis for determining violations and for computing back wages."[44] The same rules of interpretation applicable to statutes also govern the interpretation of administrative regulations.[45] If the plain language of a statute or regulation is clear, "there is no need for further inquiry and the plain language of the statute will control its interpretation."[46] As the ALJ observed, the term "may" ordinarily connotes permissive,

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40 20 C.F.R. § 655.731(d) (emphasis added).

41 8 U.S.C.A. § 1182(n)(2)(A).

42 20 C.F.R. § 655.800(b).

43 January 27, 2009 Order Denying Respondents' Motion for Summary Decision at 3; *see Lambents Group*, ARB No. 10-066, ALJ No. 2008-LCA-036 (ARB Nov. 30, 2011); 20 C.F.R. § 655.731(d)(1).

44 20 C.F.R. § 655.731(d)(1) (emphasis added).

45 *See, e.g., First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 476 (7th Cir. 1999).

46 *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039 (ARB June 29, 2007) (citing *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002)); *see also Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999).

discretionary conduct particularly when used in conjunction with the mandatory term, "shall."[47] The regulations allow recourse to ETA but do not forbid the Administrator from establishing its own prevailing wage for the purpose of assessing back wages in its notice of determination. Contrary to APMI's assertions in its brief, the Administrator's decision to go to ETA for a prevailing wage determination is discretionary under Section 655.731(d)(1), not mandatory.[48]

On appeal and before the ALJ, APMI argues that because the Administrator did not go to ETA, APMI was denied the ability to dispute the assigned wages before ETA or through the ES complaint system, which it argues was the exclusive means of challenging the PWD.[49] First of all, Respondent has no right to go to ETA at the post-LCA stage – the regulations bestow discretionary access to ETA solely on the Administrator at this stage. Any right to challenge the ETA PWD is conditioned upon the Administrator seeking a PWD from ETA in the first place. The regulations do not explicitly address appeal rights in cases where the Administrator has not consulted ETA but instead has made prevailing wage determinations based on information of record.[50] Nonetheless, the ALJ carefully reviewed the methodology the Administrator used to determine the prevailing wages at issue. The ALJ found the Administrator's actions reasonable, and we concur. We find that under the circumstances presented here, the Administrator clearly engaged in reasonable efforts to determine the prevailing wage for purposes of assessing back wages. A prevailing wage determination can be based on an "independent authoritative source," 20 C.F.R. § 655.731(b)(3)(iii)(B), or "another legitimate source" of wage information.[51]

In this case, the Administrator used the exact same source of wage data, namely the OES Wage Surveys, that APMI used in most of its LCAs. The majority of LCAs the WHD

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47 *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion. That connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall.'") (citation omitted).

48 If the Administrator obtains a PWD from ETA per Section 655.731(d)(1), then the employer may challenge the ETA PWD only by filing a petition under 20 C.F.R. § 656.41 within 30 days of receipt of ETA's PWD.

49 Pet. for Rev. at 7; APMI Br. at 7. The "ES system" or "JS system" is found in 20 C.F.R. Part 658, which is no longer relied upon in the LCA provisions found at 20 C.F.R. § 655.731. Because the current regulations incorporate a different appeal process, those found in 20 C.F.R. § 656.41, APMI's cite to the former (1994) regulation is misplaced. In 1994, the ES complaint system (658.410-426) provided an avenue for an employer to challenge a state workforce agency or state employment security agency (SWA or SESA) rate before the LCA application is filed. Current regulations provide for the OFLC NPC to process pre-LCA PWD requests and provide a separate review process if the employer wants to challenge pre-LCA PWD determinations by OFLC NPC. 20 C.F.R. § 655.41 (Subpart D).

50 20 C.F.R. § 655.840(c).

51 20 C.F.R. § 655.731(b)(3)(iii)(C).

investigator examined contained correct or mostly correct prevailing wage determinations that matched the prevailing wage listed on the OES Wage Survey APMI used. To calculate back wages in light of missing and deficient LCAs, the WHD investigator extrapolated and reconstructed prevailing wage rates from data provided. Where the prevailing wage rate listed on an LCA was lower than the corresponding prevailing rate set forth in the OES Wage Survey, the investigator substituted the incorrect wage rates with the applicable higher rates from the OES Wage Survey. With respect to the 39 missing LCAs, the investigator derived information including job title, work location, and period of employment from other available records to identify and apply the corresponding prevailing wage from the OES surveys.[52] We agree with the Administrator that under these circumstances, where the prevailing wage is readily ascertainable, it would be inefficient to mandate resort to ETA.

APMI also argues that the Administrator erred because it did not follow its internal policy as stated in the Field Operations Handbook (FOH). The excerpt states:

> If the ER [Employer] has failed to establish or document a valid PW rate (FOH71d01), the WHI [Wage and Hour Investigator] should request that the ER obtain such rate. If the ER refuses, produces a PW source that does not satisfy the regulatory requirements, or refuses to apply the appropriate PW level (from a PW source providing several levels), then a PW rate must be obtained from ETA. In such a case, ETA will be the final arbiter on PW matters.[53]

As noted above, the ARB and the ALJs have said that the implementing regulations provide that going to ETA is discretionary. The ALJ reasoned that 20 C.F.R. Part 655 fulfilled the statute's mandate, not the FOH. We agree with the ALJ that although the FOH may provide us with some guidance with respect to interpreting the Administrator's authority, the cited FOH provision is not controlling in light of the regulation.[54]

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52 D. & O. at 23; Tr. at 62-63.

53 RX-3 (FOH 71(d)(6)(a) (2006). In any event, in this case, APMI *did* provide a satisfactory PW source, i.e., the OES Wage Survey from which APMI derived most of its PWDs. The Administrator, in effect, simply used the same source to fill in the gaps that the APMI had already relied upon. Tr. at 45, 55.

54 *Cf., Administrator, Wage & Hour Div. v. Halsey*, ARB No. 04-061, ALJ No. 2003-CLA-005, slip op. at 7 (ARB Sept. 29, 2005) ("The Secretary has the power to resolve any ambiguities in her own regulations implementing the FLSA and her interpretation is controlling unless 'plainly erroneous or inconsistent with the regulation.'"); *William J. Lang Land Clearing, Inc.*, ARB Nos. 01-072, -079; ALJ Nos. 1998-DBA-001, -006; slip op at 13 (ARB Sept. 28, 2004), (citing *Reich v. Miss Paula's Day Care Ctr., Inc.*, 37 F.3d 1191 (6th Cir. 1994)). *Accord* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, § 5(c)(66) (Nov. 16, 2012)("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the

Finally, APMI argues that the ALJ compounded the Administrator's error by reviewing the validity of the PWDs. APMI cites regulatory language which expressly forbids review of PWDs: "Under no circumstances shall the administrative law judge determine the validity of the wage determination. . . ."[55] But APMI takes this language out of context. The subsection in which this prohibition appears pertains solely to review of a PWD obtained from ETA. When the Administrator chooses to go to ETA for a PWD, the regulations provide a separate framework for review through NPC and ultimately BALCA.[56] A PWD resulting from that process is a "conclusive determination for all purposes."[57] The prohibition forbidding the ALJ from "determin[ing] the validity of the wage determination" merely reiterates that a PWD obtained from ETA is reviewed elsewhere and that review is final. In any case, the ALJ did not assess the *accuracy* or *validity* of the wage determination but instead considered the *reasonableness* of the Administrator's methodology of ascertaining the prevailing wage rates.

CONCLUSION

We **AFFIRM** the ALJ's holding that going to ETA is discretionary, not mandatory. Accordingly, we **DISMISS** APMI's appeal.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Corchado, concurring:

I concur with the majority's affirmance of the ALJ's ultimate decision, but I respectfully disagree with the majority's rationale, specifically its interpretation of section 655.731(d)(1). The majority concluded that "the regulations allow recourse to ETA but do not forbid the Administrator from establishing its own prevailing wage for the purpose of assessing back wages

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Department of Labor and **shall observe the provisions thereof, where pertinent, in its decisions**." (emphasis added).)

[55] 20 C.F.R. § 655.840(c).

[56] 20 C.F.R. § 656.41; *supra* note 15.

[57] 20 C.F.R. § 655.731(d)(2).

. . . ." Supra at 10.[58] Finding no express delegation of authority, the majority explains that the Administrator's power to establish "its own prevailing wage" implicitly derives from the Administrator's investigative and enforcement authority, as well as the use of the term "may" in section 655.731(d)(1)(the "Administrator may contact the ETA" for a prevailing wage rate). As I explain below, the majority's decision seems to (1) overstate the "plain" meaning of the word "may" in section 655.731(d)(1); and (2) bypass a more straightforward reading of section 655.731(d)(1) that melds with the entire context of section 655.731, the LCA process, and the division of responsibility between ETA and WHD. For the sake of expediency, I will succinctly touch upon the various reasons causing me to concur. First, I address the majority's interpretation of section 731(d)(1).

As the majority explained, the dispute in this case centers on the meaning of "may" where section 655.731(d)(1) provides that "the Administrator may contact ETA" for a prevailing wage. Understandably, the majority relies on the general presumption that "may" means "permits" rather than "mandates," especially where the immediate context also uses the word "shall."[59] But to say that section 655.731(d)(1) has no mandate does not answer the more critical question of what "may" the Administrator do if he or she does not ask the ETA for a prevailing wage. It is not logical to conclude, without more text, that saying a party "may" do one thing also means that he or she may do something else.[60] Section 655.731(d)(1) does not *expressly* answer this question and so we must decide whether the immediate or surrounding context *implicitly* answers this question. In my view, a straightforward examination of subsections 655.731(d)(1) and (2) and other provisions of Subpart H and I leads to a long list of textual

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[58] To clarify, my disagreement with the majority applies only to those instances in which the Administrator engaged in some data analysis to set a rate or to disregard a prevailing wage rate set in APMI's approved LCAs and extrapolate a different rate for the calculation of back wages. For example, as the ALJ stated, it appears that the Administrator engaged in its own statistical analysis for 64 H-1B workers: 39 instances where the LCAs were missing and 25 other instances that were overturned by the ALJ. In contrast, in 43 instances, the Administrator discovered that the listed prevailing rate was an "even rate" and corrected the rate by performing a "purely ministerial task, akin to correcting typographical errors." D. & O. at 20.

[59] *See, e.g., Meritage Homes of Nev., Inc. v. F.D.I.C.*, __ F. 3d __, 2014WL1424462, *6 (9th Cir. 2014)("may" usually implies some degree of discretion, e.g., that the court "may summon" a party but also has discretion not to summon the party); *Air Line Pilots Assoc., Int'l, v. US Airways Group, Inc.*, 609 F.3d 338, 342 (4th Cir. 2010)(interpreted term "may" to mean that the air carriers "may" or "may not" decide to create a group board of adjustment).

[60] *See, e.g.*, 2 A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.23, p. 426 (7th rev. ed. 2014) ("all versions of the *expressio unius* rule reflect the same common-sense premise that when people say one thing, they do not mean something else"). *See also In re Ionosphere Clubs, Inc.*, 111 B.R. 436, 441 (S.D.N.Y. 1990) (the meaning of the term "may" is determined from the context, e.g., that a party "may" file a petition with the Bankruptcy clerk does not mean the party may file elsewhere).

evidence consistently weighing against the Administrator's claimed authority to establish prevailing wages in H-1B LCAs.

Starting with the most immediate context, the sentence in 655.731(d)(1) containing the permissive "may" (the "ETA sentence") suggests a very limited permission. In the ETA Sentence, three alternative conditional clauses lead to the delegation of a specific power, "the Administrator may contact ETA," and establish the limited circumstances that allow the Administrator to contact the ETA. Consequently, given these three pre-conditions, it seems more logical to understand the ETA sentence to say: (1) "where" the employer has insufficient documentation; or (2) "where" the Administrator doubts the accuracy of the employer's findings from an "independent authoritative" or "legitimate source;" or (3) "where" the employer fails to prove the propriety of the findings from a "legitimate" source – *then* the Administrator "may" contact the ETA but not in the absence of one of these conditions. It is indisputable that the ETA Sentence does not say that the Administrator may go elsewhere to establish the prevailing wage rate.

The remaining provisions of subsection 655.731(d)(1) further evidence the limited power granted to the Administrator with respect to the prevailing wage. The opening sentence in 655.731(d)(1) clearly identifies that the Administrator's role in that subsection is to determine whether the employer "has the proper documentation required in [655.731](b)(3)" and "whether the documentation supports the employer's wage attestations." The employer's failure to maintain such documentation constitutes a violation.[61] This delegation of authority, to investigate the employer's documentation and proof, stops short of empowering the Administrator to establish a different rate. Subsection 731(d)(1) goes on to explain that it is ETA's prevailing wage determination that "the Administrator *shall* use as the basis for determining violations and for computing back wages,"[62] and nowhere provides that the Administrator can rely on his or her own prevailing wage determinations. Continuing in the same vein, section 655.731(d)(1) expressly provides that the Administrator's investigation shall be suspended "while the ETA makes the prevailing wage determination," but again fails to mention any other wage determination process.

Subsection 655.731(d)(2) continues seamlessly from where 655.731(d)(1) ended. This subsection establishes a detailed procedure by which employers can appeal the prevailing rate determinations ETA makes pursuant to 655.731(d)(1). First, the employer appeals to the NPC Center Director and, second, to the Board of Alien Labor Certification Appeals (BALCA), "the conclusive determination for all purposes."[63] Subsection 655.731(d)(2) neither discusses nor provides for appeals of any other prevailing wage rate determinations. It makes no sense to create such an elaborate appeal process that can be completely and easily bypassed if the Administrator chooses to establish the prevailing wage rates.

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61 29 C.F.R. § 655.801(a)(15).

62 29 C.F.R. § 655.731(d)(1)(emphasis added).

63 29 C.F.R. § 655.731(d)(2), (2)(i).

Subsection 655.731(d)(3) adds yet another textual indicator that the Administrator has no delegated authority to establish a prevailing wage rate. That subsection expressly provides that "[f]or purposes of this paragraph (d), OFLC may consult with the NPC to ascertain the prevailing wage applicable under the circumstances of the particular complaint," but says nothing about the Administrator. Time after time subsection 655.731(d) discusses the process for establishing a prevailing wage rate and time after time never mentions that the Administrator had any authority to establish a prevailing wage rate. Reading subsection 655.731(d) exactly as written means that the Administrator must go to ETA to obtain a prevailing wage determination *if the Administrator wants to calculate back wages*.[64] If the Administrator opts to pursue only a documentation violation, it may opt not to go to the Administrator. To conclude otherwise requires the addition of words not found in subsection 731(d).

Glancing throughout 29 C.F.R., Part 655 (Subparts H and I), leads to more evidence that the Secretary has not delegated authority to the Administrator to set prevailing wages for H-1B LCAs. First and most importantly, the Administrator has not identified a regulation where the Secretary expressly delegated authority to the Administrator to set prevailing wage rates in H-1B cases. In subsection 655.731(a), the Secretary lists several sources for obtaining a prevailing wage determination that include ETA (OFLC NPC) but not the Administrator.[65] The regulations expressly require the OFLC NPC "to follow 20 C.F.R. § 656.40 and other administrative guidelines or regulations issued by ETA." The Administrator's power to investigate and enforce the proper payment of wages expressly refers the Administrator back to subsection 655.731. Consistent with subsection 655.731, the Administrator has the power to investigate the employer's failure to maintain proper documentation, but nowhere identifies the independent power to set the prevailing wage in H-1B investigations.

Finally, I respectfully disagree with several inferences the majority draws to support the conclusion that the Administrator has authority to establish its own prevailing wage rates in H-1B cases. For example, I disagree that the discretion to investigate complaints grants discretion to set prevailing wage rates, especially in the face of subsection 655.731(d). Such logic would also support the conclusion that the power to investigate LCA violations grants the Administrator the power to approve LCAs, authority the Administrator most certainly does not have. Moreover, enforcing wage obligations fundamentally differs from establishing a prevailing wage rate that applies beyond the H-1B employer and employees in the case at hand. I disagree that a Congressional delegation of authority to the Secretary also gives the WHD authority to set wages where the Secretary created different divisions and expressly delegated different authority to each division. Neither the Administrator nor the Board can cite "efficiency" as a reason to justify an agency action without first finding the legal delegation of authority for such action. I also disagree with the inference that, because the H-1B employer has alternative sources for

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64 See note 58.

65 In contrast, the regulations expressly empower the Administrator to set the prevailing wages for contracts covered by the Davis Bacon Act, as amended, 40 U.S.C.A. §§ 3141-3148 (West Supp. 2012).

establishing prevailing wage rates in an LCA, the Administrator should have the same flexibility. Unlike the H-1B employer, the Administrator is a government official and regulated by due process principles when it prosecutes H-1B employers to order the payment of back wages.[66]

I concur in the majority's ultimate decision for several reasons, and I shall list some for the record. First, APMI has reduced its appeal to a procedural objection but has failed to show that the result would be any different. Second, the stipulated facts and ALJ's findings show that DOL's investigation occurred over a two-year period with APMI's knowledge and participation; yet, APMI provided no evidence that it raised a procedural objection before the Administrator's Determination letter dated March 10, 2008. Thus, given the specific facts of this case, APMI's procedural objection is untimely. In the end, APMI had the legal duty to prove that it was paying all of its H-1B workers the "required wage rate" (the prevailing wage rate or a higher actual wage rate), but it could not produce 39 LCAs or explain how 43 LCAs had an "even rate" not listed in the sources that APMI identified. APMI offered only two affidavits as testimonial evidence (from its legal counsel not fact witnesses) and no proof that it was paying the "required wage" as explicitly mandated in subsection 655.731. Yet, citing only the prejudice of losing the ability to appeal under 655.731(d)(2), it "asks the Board to dismiss the DOL's determination that Respondents owe approximately $2.9 million in back wages . . . ." Consequently, while I agree with APMI that the Administrator exceeded her delegated authority by independently establishing a prevailing wage rate, APMI failed on appeal to demonstrate why a dismissal or remand was warranted under the specific facts of this case.

LUIS A. CORCHADO
Administrative Appeals Judge

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[66] *See, e.g.*, *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)(applying due process principles to administrative adjudication). The Board did not expressly consider this fundamental difference between an H-1B employer and a prosecuting government agency, among other issues I raise, when it decided *Administrator v. The Lambents Group*, ARB No. 10-066, ALJ No. 2008-LCA-036, slip op. at 18 (ARB July 27, 2012). Also, with respect to subsection 20 C.F.R. § 655.820(c), I reserve for another day the question of whether the phrase "under no circumstances" means something other than "under no circumstances" where the regulation prohibits the ALJ from determining the "validity of the wage determination . . . ."